

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

BOBBY E. GARDNER III,

Petitioner,

v.

CIVIL ACTION NO. 2:12-cv-05111

MARVIN PLUMLEY,

Respondent.

ORDER

Pending before the court are documents appearing to be the petitioner's motion under 28 U.S.C. § 2254.¹ This action was referred to the Honorable Mary E. Stanley, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommended that the court **FIND** that the petitioner has failed to prosecute this action, and further recommended that the court **DISMISS** the petition, without prejudice, for failure to exhaust state court remedies. The Magistrate Judge has also recommended that the court **DENY**, without prejudice, the petitioner's Application to Proceed Without Prepayment of Fees and Costs [Docket 1].

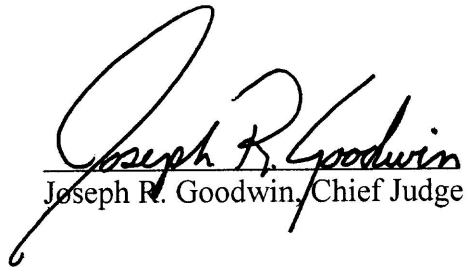
Neither party has filed objections to the Magistrate Judge's findings and recommendation. Accordingly, the court **ADOPTS** and incorporates herein the findings and recommendation of the Magistrate Judge. The court **FINDS** that the petitioner has failed to

¹ As the Magistrate Judge noted, one of the issues in this case is whether the petitioner intended to file a Petition for Appeal in the Supreme Court of Appeals of West Virginia, or whether he intended to file a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (Proposed Findings & Recommendation [Docket 6], at 4). The petitioner failed to respond to the Magistrate Judge's inquiry on this issue. (*Id.*).

prosecute the action, and the court **ORDERS** that the petition be **DISMISSED**, without prejudice. Finally, the court **DENIES**, without prejudice, the petitioner's Application to Proceed Without Prepayment of Fees and Costs [Docket 1].

The court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge Stanley, counsel of record, and any unrepresented party.

ENTER: December 5, 2012


Joseph R. Goodwin, Chief Judge